STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs.

LORINDA IRENE SWAIN,
Defendant-Appellant.

Supreme Court No. 150994
Court of Appeals No. 314564
Lower Court No. 2001-004547-FC

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT APPEALED FROM, GROUNDS FOR RELIEF, AND RELIEF SOUGHT

Defendant-Appellant Lorinda Swain appeals from the February 5, 2015 Court of Appeals Opinion reversing the lower court's order granting her Motion for Relief from Judgment. Court of Appeals Opinion; Appendix A. This Court should grant this Application for Leave to Appeal or summarily reverse the decision below and remand for a new trial for the following reasons:

1. The Court of Appeals clearly erred in holding that in order to satisfy the MCR 6.502(G)(2) new evidence exception for a subsequent motion for relief from judgment, a defendant must satisfy the four-prong test set out in *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003), even where the defendant has not raised a substantive *Cress* claim. This interpretation is foreclosed by the plain text of the rule and the Michigan Court Rules as a whole, and it lacks any support from *Cress* itself or any other authority from this Court. This Court should thus grant leave to appeal or summarily reverse the lower court decision. MCR 7.302(B)(5). Further, because this interpretation will affect a large number of defendants who, through no fault of their own, discover evidence of a violation under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), after filing their first motion for relief from judgment, this case is of major significance to this state's jurisprudence. MCR 7.302(B)(3). Finally, this erroneous decision will cause a material injustice if allowed to stand, MCR 7.302(B)(5), by denying a new trial to a wrongfully convicted woman who has twice convinced the trial court that she is likely innocent.

2. The Court of Appeals clearly erred in reversing the trial court's decision to grant Ms. Swain relief from judgment because the prosecution withheld material and exculpatory evidence of a phone interview with Ms. Swain's former, estranged boyfriend, Dennis Book, in violation of the Fourteenth Amendment and *Brady v Maryland*. In assessing

the *Brady* claim, the Court of Appeals rejected the trial court's definition and narrowly construed the evidence as Book's personal knowledge, as opposed to the suppressed interview itself. This interpretation contradicts the reasoning in *Brady* itself. This interpretation would also impact a large percentage of defendants asserting *Brady* claims. The question is therefore of major significance to this state's jurisprudence. MCR 7.302(B)(3). Finally, this erroneous decision will cause a material injustice if allowed to stand MCR 7.302(B)(5).

3. The Court of Appeals erred in holding that the trial court abused its discretion in granting Ms. Swain relief under *Herrera v Collins*, 506 US 390; 113 S Ct 853; 122 L Ed 2d 203 (1993) and MCL 770.1. The issue of how Michigan courts should treat strong evidence of actual innocence has major significance to the state's jurisprudence, MCR 7.302(B)(3), and this Court has already recognized the need to address it. *People v Garrett*, 493 Mich 949; 828 NW2d 26 (2013).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this application for leave to appeal pursuant to MCR 7.301(A)(2). This Amended Application is timely under MCR 7.302(C)(2) because the prior Application was filed within 56 days of December 11, 2014, the date of the Michigan Court of Appeals first opinion reversing the trial court's grant of Ms. Swain's motion for relief from judgment. This Amended Application is also filed within 56 days of the second opinion, issued on February 5, 2015.

STATEMENT OF QUESTIONS INVOLVED

I. Did the Court of Appeals clearly err in holding that in order to satisfy the MCR 6.502(G)(2) new evidence exception to bring a subsequent motion for relief from judgment, a defendant must satisfy the four-prong *Cress* test, even where the defendant has not raised a substantive *Cress* claim?

The Court of Appeals answered, "No."
The Defendant-Appellant answers, "Yes."

II. Under the correct interpretation of the rules, does the exculpatory phone interview qualify as new evidence within the meaning of MCR 6.502(G)(2)?

The Trial Court Answered, "Yes."
The Court of Appeals did not answer this question
The Defendant-Appellant answers, "Yes."

III. Did the Court of Appeals clearly err in holding that the prosecution's suppression of a phone interview containing material and exculpatory evidence was not a violation of *Brady*, where Ms. Swain's former, estranged boyfriend told the detective investigating the case that Ms. Swain had not committed the alleged abuse?

The Court of Appeals answered, "No."
The Defendant-Appellant answers, "Yes."

IV. Did the Court of Appeals clearly err in holding that the trial court abused its discretion in granting Ms. Swain a new trial based on *Herrera v Collins* and MCL 770.1, where the trial court indicated it had no doubt of the significant possibility of Ms. Swain's innocence?

The Court of Appeals answered, "No."
The Defendant-Appellant answers, "Yes."

V. To the extent Ms. Swain's claims are procedurally barred by MCR 6.500 *et seq*., should the Supreme Court grant relief pursuant to its authority under MCR 7.316(A)(7)?

The Trial Court did not answer this question.
The Court of Appeals did not answer this question.
The Defendant-Appellant answers, "Yes."

INTRODUCTION

Judge Conrad Sindt, who served as the chief prosecutor of Calhoun County for nearly a decade and was the original trial judge in Defendant-Appellant Lorinda Swain's case, has twice ruled that there is a significant possibility of her innocence and granted a new trial. He has "no doubt about it." Trial Court Opinion at 7; Appendix B. Despite the fact that Judge Sindt has personally observed the testimony of every witness at every stage of this case, that he wrote a strong, well-reasoned opinion granting relief from judgment, and that the abuse of discretion standard counsels extreme deference to that decision, the Court of Appeals has reversed him.

In his most recent ruling, Judge Sindt held the prosecution suppressed exculpatory information in violation of *Brady v Maryland* by failing to disclose a phone interview in which Ms. Swain's former boyfriend made clear to police that the crime in question never occurred. In reversing this decision, the Court of Appeals distorted clear Michigan law. First, it explicitly grafted the *Cress* newly discovered evidence requirements onto MCR 6.502(G)(2), introducing requirements more prohibitive than this Court ever intended. Further, the Court of Appeals incorrectly defined the evidence at issue in the *Brady* violation and failed to give proper deference to the trial court's findings under the abuse of discretion standard.

Left unchecked, the fundamental misunderstanding of Michigan law will prevent deserving defendants from bringing legitimate constitutional claims. This Court should therefore either grant the application for leave to appeal or summarily reverse the Court of Appeals's decision and remand this case for a new trial.

STATEMENT OF FACTS

Lorinda Swain was sentenced to 25-50 years in prison for a crime the complainant has admitted under oath never occurred. In 2002, she was convicted of four counts of first-degree

criminal sexual conduct based on allegations that she had abused her adopted son, Ronnie Swain, when he was five to eight years old. Not only has Ronnie, who is now an adult, recanted many times over the years, including under oath at the most recent evidentiary hearing, but significant independent evidence has also emerged indicating that Ms. Swain is innocent of all of the charges against her.

Most recently, Ms. Swain discovered that an exculpatory phone interview had been conducted between her former boyfriend, Dennis Book, and the detective investigating the allegations against her. Book told the detective that he never witnessed any abuse, even though he lived with Ms. Swain and was consistently in the house while the boys were getting ready for school (the time of day that the crime allegedly occurred). This interview was never disclosed to the defense.

A. The Trial

The main evidence against Ms. Swain was Ronnie's testimony and that of his younger brother, Cody. Ronnie, who was 14 years old at trial, testified that Ms. Swain put her mouth on his penis every weekday before school from when he was five until he was approximately eight years of age. Trial Tr. Aug. 13, 2002, Vol. II 159, 167-68. Ronnie said that his younger brother, Cody, was sent to wait for the bus during these incidents. When the bus arrived, Cody would run back to the house and bang on the door to signal to Ms. Swain to send Ronnie out to the bus. *Id.* at 159, 167-168. Ronnie testified that this conduct occurred every day, except for weekends. *Id.* at 167-68. Cody, then 13 years old, confirmed the story about waiting alone for the bus and then running back to knock on the door. Trial Tr. Aug. 14, 2002, Vol. III, 14.

Detective Guy Picketts of the Calhoun County Sheriff's Department, the lead investigating officer, testified about his investigation and his interview with Ms. Swain. Picketts testified that when he told Ms. Swain that the complaint was about oral sex and the complainant

was Ronnie, Ms. Swain retorted with a denial of the allegations, stating "I never sucked my kid's dick." Trial Tr. Aug. 14, 2002, Vol. III, 46-47 ("Initially I told her that there had been a complaint at this time [sic] had been lodged and she was a suspect in a criminal sexual conduct complaint; that the complaint had been lodged by Ronal and Linda Swain, and I told her that the victim was one Ronald Swain, her son . . . *Once I started to say the complaint involved oral sex*, she immediately became rather vocal and animated, and made a statement in regard to that.") (emphasis added). In its findings, the Court of Appeals misstates, in an important way, this part of the Picketts testimony. The opinion stated that Ms. Swain denied the accusations *before* Picketts had even told her what the specific allegation was or who the alleged victim was. Court of Appeals Opinion at 8; App. A. However, this is a plain misstatement of the record.[1]

The only other "evidence" of any kind offered against Ms. Swain was the testimony of serial jailhouse informant Deborah Charles, who claimed Ms. Swain confessed to her in prison. Trial Tr. Aug. 14, 2002, Vol. II 76. There is widespread agreement that Charles is a habitual liar. **She has been convicted of uttering and publishing 19 times and has at least eight additional felonies convictions relating to dishonesty (forgery, false pretenses, etc.)**. See Documents Pertaining to Deborah Charles (Exhibit K to 2009 Motion for Relief from Judgment). Another inmate testified that Charles admitted that her testimony against Ms. Swain was a lie. Trial Tr. Aug. 14, 2002, Vol. II 92-94; Aug. 15, 2002, Vol. I 8-9. Indeed, Charles's MDOC file is littered with false allegations that she has made against fellow inmates, as well as instances where she

[1] Further proof that the Court of Appeals grossly misstated the record comes from Detective Picketts's September 7, 2001, police report: "After Lorinda Swain read her rights and indicated she would talk to the R/D, R/D advised her that she was under investigation in regards to a Criminal Sexual Conduct complaint filed with the Calhoun County Sheriff's Department by Ronald and Linda Swain. **R/D advised Lorinda Swain that the victim was one Ronald** [sic] **Swain. When she inquired as to what type of sex complaint, R/D started to say it involved oral sex**, and at that point in time Lorinda Swain became extremely excited and animated and yelled at the R/D, and her statement was 'I never sucked my kid's dick.'" Report of Detective Picketts #0006676.01C (Sept. 7, 2001) at 5 (emphasis added); Appendix C.

claimed to have information about cases she obviously knew nothing about — such as the 1996 murder of JonBenet Ramsey in Boulder, Colorado — and the **MDOC investigator who worked with her concluded that she is not to be trusted**. See Ex K to 2009 Motion for Relief from Judgment..[2]

Therefore, even the prosecutor emphasized that Ronnie's testimony was the only evidence the jury needed to rely on, both in the opening statement ("it is not necessary that there be evidence other than the testimony of Ronald [sic] Swain . . . and I'm going to ask you to keep that instruction in mind"), and in the closing argument ("to prove these charges it is not necessary that there be evidence other than the testimony of Ronald [sic] Swain"). Trial Tr. Aug. 13, 2002, Vol. II 131; Aug. 15, 2002, Vol. II 100.

Ms. Swain testified in her own defense, denying all of the allegations of sexual abuse. The jury deliberated for two full days and part of a third day before announcing it was deadlocked, and it returned a verdict only after being given a deadlocked jury instruction. See July 21, 2009 Trial Court Opinion at 3; Appendix D. Ultimately Ms. Swain was convicted and sentenced to 25-50 years in prison.

B. Appeal and Post-Conviction Motions

Ms. Swain appealed her conviction to the Court of Appeals. Among the claims on direct appeal was the recantation of Ronnie Swain, which had first been raised in a motion for new trial in the trial court. See *People v Swain*, unpublished opinion per curiam of the Court of Appeals,

[2] The Court of Appeals opinion also has a lengthy summary of the testimony of Dr. Randall Haugen, an expert on sexually abused children. Court of Appeals Opinion at 8. App. A. Given that Dr. Haugen could not comment on the truth of Ronnie's allegations and just gave general testimony about behaviors of sexual abuse victims, his testimony was of limited importance. Additionally, to the extent such expert testimony carries any weight, Ms. Swain notes that Dr. Stephen Miller, a clinical psychologist, interviewed Ronnie and concluded that Ronnie's "recantation of his original allegations of sexual abuse [is] entirely plausible, sincere and reliable." Report of Dr. Stephen Miller; Exhibit B to 2009 Motion for Relief from Judgment.

issued Feb. 24, 2014 (Docket No. 244804); Appendix E. By this point, Ronnie Swain had already emphatically and consistently recanted his allegations against his mother. He admitted that he came up with the allegations to explain away his behavior after his stepmother found him engaging in sexual misconduct with a younger relative. And he tried to correct his lie by speaking to the media, to prosecutors and to the police, and by taking and passing a polygraph exam during which he admitted his trial testimony was false. See EH 12/20/2011 at 86, 87, 89, 90, 91; EH 4/26/2012 at 48-49.

Subsequently, Ms. Swain filed at least one prior motion for relief from judgment, which the trial court denied.

C. Current Motion for Relief from Judgment

On March 19, 2009, represented by current counsel, Ms. Swain filed the instant motion for relief from judgment, raising three new claims: (1) newly discovered evidence warranting relief under the *Cress* standard, consisting of two different areas of new evidence — (a) the recantation of Cody Swain, and (b) new testimony from school bus driver Tanya Winterburn and a neighbor, William Risk, both showing that Ronnie and Cody's trial testimony (that Cody waited for the bus alone) could not be true; (2) an alternative claim of ineffective assistance of counsel for prior counsel's failure to present the testimony of Winterburn and Risk; and (3) a claim of ineffective assistance of appellate counsel for failure to exhaust state remedies (by filing an application for leave to appeal to this court) or to advise Ms. Swain to exhaust her remedies in her appeals.

After a 2009 evidentiary hearing limited to the Winterburn and Risk claims, Judge Sindt held that evidence from Winterburn and Risk was significant and substantially undermined the prosecution's case. He held that the testimony was not newly-discovered evidence itself, but agreed with Ms. Swain's alternative argument that the failure to present these exculpatory

witnesses at trial and on appeal constituted ineffective assistance of trial and appellate counsel. July 21, 2009 Trial Court Opinion at 4-7; App. D. On that ineffective assistance claim, Judge Sindt granted Ms. Swain's motion for relief from judgment. *Id.* at 9-11.

The Court of Appeals originally denied the prosecution's application for leave to appeal. After this Court ordered a remand for consideration as on leave granted, *People v Swain*, 485 Mich 997; 775 NW2d 147 (2009),[3] the Court of Appeals reversed Judge Sindt's 2009 Order in a published opinion in 2010. The appellate court held that, since Ms. Swain knew at trial that Winterburn and Risk would give exculpatory testimony, this evidence did not satisfy the gateway new evidence standard of MCR 6.502(G)(2). *People v Swain*, 288 Mich App 609, 634–35; 794 NW2d 92 (2010). Ms. Swain sought leave to appeal in this Court, which denied leave by a 4-3 vote on December 16, 2010. *People v Swain*, 488 Mich 992; 791 NW2d 288 (2010). The Court denied reconsideration by the same vote on April 28, 2011. *People v Swain*, 489 Mich 902; 796 NW2d 257 (2011).

On May 5, 2011, once jurisdiction returned to the trial court, Ms. Swain moved that court to decide the two remaining claims from her 2009 motion (the recantation of Cody Swain and ineffective assistance of appellate counsel). Ms. Swain also sought permission to supplement her 2009 motion for relief from judgment with an additional claim: a *Brady* violation based on new evidence.

On May 16, 2011, the trial court ordered an evidentiary hearing on the remaining and supplemental claims. The prosecution objected, and argued in the Court of Appeals that the trial court could not hear the remaining and supplemental claims. However, the Court of Appeals

[3] This Court directed the appellate court to address (1) whether Ms. Swain's successive motion for relief from judgment was barred by MCR 6.502(G), and (2) if it was, whether her constitutional rights were implicated given that the trial court found a significant possibility of her innocence.

disagreed and remanded the case for an evidentiary hearing on the claims. *People v Swain*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 25, 2011 (Docket No. 304228); App. F.

D. The 2011-12 Evidentiary Hearing

The evidentiary hearing was held on December 20, 2011, and continued on April 26, 2012. At that hearing, Ms. Swain presented evidence that the lead detective on her case had suppressed evidence of an exculpatory phone interview of Dennis Book, Ms. Swain's former and estranged boyfriend.

1. Ms. Swain's Witnesses at the 2011-12 Evidentiary Hearing

Dennis Book lived with Ms. Swain and her two adopted sons at their trailer on Nine Mile Road in Union City for nearly all of the time she was allegedly sexually abusing Ronnie on a daily basis. EH, 12/20/2011 at 6-9, 58-59. Book testified that he met Ms. Swain in September 1994 at The Harvester Bar in Climax. *Id.* at 6-7, 55. He recalled that they met on the first day of school for Ms. Swain's children, and they started dating immediately. *Id.* at 56-57. By November 1994, he was spending almost every night at the trailer on Nine Mile Rd. *Id.* at 58-59. By early 1995, when the sexual abuse was supposed to have occurred, he had practically moved into the trailer. *Id.* at 59-61. He would "come home at night and be there all night, get up in the morning . . . [and] go to work after the kids went to school." *Id.* at 59.

During this period of time, Book became involved Ronnie and Cody's lives. *Id.* at 48 ("I took them fishing and—and we camped out and did all kinds of stuff."). He was there in the morning when Ms. Swain would get the boys ready for school and when the bus picked them up. *Id.* at 62. Book testified that he could not recall ever leaving the trailer before the children left for the bus, because he wanted to spend time with Ms. Swain before he left for work. *Id.* at 63.

While still living with Ms. Swain and her two sons, in November 1996, Book bought the

trailer they lived in from Ms. Swain's father, George Johnson. EH 12/20/2011 at 9. Shortly thereafter, Book and Ms. Swain had a falling out, and Ms. Swain moved out "probably two/three months" after he bought the trailer. *Id.* at 61; and *id.* at 64-65.

After Ms. Swain moved out, she and Book continued to see each other periodically until 2000, when the relationship ended for good. *Id.* at 10, 78. Book had grown angry toward Ms. Swain for using drugs and seeing other men, so he cut off contact with her completely. *Id* at 10; 78-79 ("I'd just had all I could take and I'd go . . . I can't have nothing to do with her or her family . . . I hated her so bad I couldn't — didn't want to hear her name, nothing").

Book was not aware that Ms. Swain had been arrested for sexually abusing Ronnie until he received a phone call from Detective Guy Picketts around 2002. *Id.* at 11. Picketts called Book to ask him about the allegations against Ms. Swain. *Id.* at 11-12. Book recalled this phone call specifically, remembering where he was and the time of day when he received the call. *Id.* at 11 ("I was leaving work heading into Galesburg on 33rd Street . . . late afternoon"). When Picketts asked Book about the alleged sexual abuse, Book firmly told him that the allegation was not true, and Ms. Swain never abused Ronnie. *Id.* at 12.

Picketts then accused Book of knowing that the sexual abuse was going on and not stopping it. *Id.* at 11, 38-39. Book responded by telling Picketts that if he thought Ms. Swain was sexually abusing Ronnie, he would have called the police and turned her in himself. *Id.* at 12. Indeed, Book testified that he did report Ms. Swain to the authorities on other occasions when she actually did violate the law. See *id.* at 12*;* see also Trial Tr. Vol. II, 08/15/2002 at 37 (Ms. Swain testifying that Book once turned her in for a probation violation). He testified that if the allegations were true — if Ms. Swain was really sending Cody out to wait for the bus on a daily basis while she performed oral sex on Ronnie — he would have known about it. *Id.* at 15.

It made sense that Detective Picketts would have called Book before trial because police

documents show that Picketts knew that the alleged sexual abuse had occurred at a time when Book was living at the trailer with Ms. Swain and her boys. See Def. Ex. 2 at Evid. Hrg., Report of Detective Picketts #0006676.01A (Sept. 7, 2001); Appendix G.

Book never told anyone about the phone call from Detective Picketts until 2011, when he visited Ms. Swain after she had been released from prison. *Id.* at 12-13, 16. He testified that he is "basically a hermit" and does not talk to many people. *Id.* at 68. He did not know the significance of his phone call with Picketts until much later, and he initially did not deem the incident worth discussing. *Id.* at 44.

Book testified he was not speaking to Ms. Swain around the time that she was arrested. EH 12/20/2011 at 13. When Ms. Swain's father went to Book's house to see if he might be a potential witness for Ms. Swain's defense, Book refused and "told him [he] didn't want nothing to do with it" because he was "still pretty angry with her . . . ." *Id.* at 71; see also *id.* at 42-43. He did not attend Ms. Swain's trial. *Id.* When Ms. Swain tried to call him around the time of her trial, he did not take her calls. *Id.* When she wrote to him, he threw her letters away. *Id.* at 14.

Book continued to feel angry toward Ms. Swain and refused to speak to her for several years after she was convicted. *Id.* at 14. But Book also testified that, if subpoenaed, he would have come to court and truthfully testified that the allegations against Ms. Swain were false. *Id.*

Trial counsel **Edwin Hettinger** testified that the prosecution never turned over any information about the Dennis Book interview. EH 04/26/2011 at 7-8. Hettinger did not call Book as a witness at Ms. Swain's trial because he learned from Ms. Swain and her father that Book would be hostile, given the fact that he and Ms. Swain had gone through a bad break-up. *Id.* at 6-7. If Hettinger had known that Book made the statements to Detective Picketts that he testified to making at the 2011-12 evidentiary hearing, he would have at least interviewed Book and probably would have subpoenaed him. *Id.* at 11*;* see also *id.* at 9 ("My thoughts were if there was

anything that would help, I would put it in there. And that would certainly have helped").

Ronnie Swain testified at the evidentiary hearing and confirmed that Book lived at the trailer on Nine Mile Road during the timeframe of the alleged abuse he had accused his mother of committing. EH 12/20/2011 at 85. Ronnie remembered that Book was around "like every day" and that he was an authority figure in the lives of Ronnie and his brother, Cody. *Id.* at 91, 96. He remembered that Book would be "right there in the living room" in the mornings while the boys were getting ready for school. *Id.* at 91-92, 97.

Ronnie also testified that his previous allegations of sexual abuse against Ms. Swain were false. *Id.* at 83-84, 87. He explained why he had lied: his stepmother, Linda Mort-Swain, had learned that Ronnie had been sexually abusing his niece. *Id.* at 86. His stepmother suggested that for Ronnie to know about oral sex, someone must have molested him in the past. *Id.* Ronnie came up with the story that Ms. Swain had performed oral sex on him, and his stepmother told him that "she kind of figured that something like that had happened." *Id.* He said all of this because this seemed like what his stepmother wanted to hear, and he was angry at Ms. Swain because of her drug abuse. *Id.* at 86-87.

Ronnie stated that he had previously watched pornographic movies at his father's house with his stepbrother David, and that is how he learned about oral sex. *Id.* at 85-86. Ronnie lied about being sexually abused because he was worried that he would get in trouble with his stepmother. *Id.* at 87. Ronnie admitted that Ms. Swain never sexually abused him, never slept naked with him, and never sent Cody to wait for the bus while she dressed Ronnie. *Id.* at 94. These were all lies invented by Ronnie out of fear that he was going to be in trouble. *Id.* at 87-88.

Cody Swain testified that during 1995 and 1996, he lived at the trailer on Nine Mile with Ms. Swain, Dennis Book, and Ronnie. *Id.* at 111-12. When Book was living at the trailer, Cody would see him around the trailer "before school and sometimes after." *Id.*

Cody also affirmed his prior testimony from the 2009 evidentiary hearing that he "never" waited for the school bus by himself, contrary to what he had testified to at trial. EH 12/20/2011 at 113. He also admitted that the only reason he slept on a small bed by himself (while Ms. Swain and Ronnie slept together on a larger bed) was that he used to wet the bed. *Id.* at 116. Cody testified that he never saw his mother sleeping without her clothes on. *Id.* Finally, he also testified that he and his brother Ronnie learned about oral sex from watching pornographic movies in the basement of his father's house. *Id.* at 117. Cody testified that he lied at his mother's trial because he had been coached by his stepmother. *Id.* at 114-15.

Mary Stephens testified that she is Ronnie and Cody's biological grandmother and is not related to Ms. Swain. EH 04/26/2012 at 54-55. She recalled that in the mid-1990s, she met Book "many times," and that Book was living with Ms. Swain during this time. *Id.* at 55-56.

Stephens recalled the time period when Ronnie testified against Ms. Swain, and that, immediately after testifying, he admitted to her that he had lied in his testimony. *Id.* at 56-57. She said she was always very close to Ronnie and Cody, and she remained that way after their trial testimony. *Id.* at 61-62. Both boys ended up living with her and graduated from high school under her watch. *Id.* at 62. Over the years, Ronnie recanted his testimony "a lot of times." *Id.* at 59. Stephens took Ronnie to the Albion Police Station in 2002 because "[H]e wanted to go . . . he demanded . . . [H]e wanted to tell the truth that he lied on his mother." *Id.* at 57-58. Ronnie also admitted his perjury to his "adopted father," his "stepmother Lynn," "his biological mother and sister," and to Dr. Stephen Miller — whom Stephens took Ronnie to see "[b]ecause Ronnie wanted to see him to tell him the truth and have it all recorded." *Id.* at 59-60.

Stephens also took Ronnie and Cody to meet with former prosecutor John Hallacy, a meeting that, to the best of her recollection, occurred in 2007. *Id.* at 60. Hallacy met with the two boys separately, but Stephens was present for both meetings. *Id.* at 60-61. The boys told Hallacy

that they had lied at trial and "wanted to see what else they could do" to help. *Id.* at 61.

Cheryl Fox, who was once married to Ms. Swain's ex-husband Ronal Swain, supplied a sworn affidavit, which was admitted by stipulation. *Id.* at 66-67. Fox attested that when she would go to the trailer with Ronal to see the boys beginning in early March 1995, Dennis Book would be there. Def. Ex. 5 at Evid. Hrg., Affidavit of Cheryl Fox ¶¶ 6-7; Appendix H. Fox attested that while she "was never fond of Lorinda, given that she was [her] husband's ex-wife," Fox was shocked to hear Ronnie's allegations against Ms. Swain, and did not believe he was telling the truth. *Id.* ¶ 9.

George Johnson, Ms. Swain's father, recalled that Book had been living with Ms. Swain for "a couple years" before he sold the trailer on Nine Mile Road to Book on November 4, 1996. *Id.* at 37, 38. Johnson was very involved in Ms. Swain's defense, and provided defense counsel with a list of witnesses he thought would be worth calling. *Id.* at 39. Johnson did not put Book on that list because he had broken up with his daughter and remained hostile. *Id.* at 39, 42. Johnson recalled a specific incident, when Book had become "really irate" and "really hot" at Ms. Swain over a missing gas can. *Id.* at 39-40. Johnson concluded that Book was an angry person who would make a hostile witness if called by the defense. *Id.* at 39-42.

Terry Anderson, a polygraph examiner with more than 35 years of experience, including more than 15 years as a Michigan State Police polygrapher, also testified. *Id.* at 28-30. Anderson affirmed that he administered a polygraph examination to Dennis Book and to Ronnie Swain. *Id.* at 32, 48; 49-50. He testified that, in his professional opinion, Book was being truthful when he said that Detective Picketts contacted him regarding the allegations against Ms. Swain, and that he flatly denied those allegations in his conversation with Picketts. *Id.* at 51. He also testified that, in his professional opinion, Ronnie was being truthful when he indicated that his trial testimony against Ms. Swain was false, and that she had not sexually abused him. *Id.* at 49.

2. Prosecution's Witnesses at 2011-12 Evidentiary Hearing

Detective Brian Gandy of the Calhoun County Sheriff's Office worked with Detective Picketts for 15 years. EH 04/26/2012 at 69. Gandy testified that Picketts did not generally conduct interviews by phone. *Id.* at 70. Picketts would sometimes call witnesses to ask them to come in for an interview. *Id.* at 76. According to Gandy, whenever Picketts interviewed a witness, he "always did supplemental reports." *Id.* at 71.

Deirdre Ford-Buscher, the trial prosecutor in this case, also testified. *Id.* at 81. She said that Detective Picketts preferred not to conduct interviews over the phone, and that he prepared supplemental reports without fail. *Id.* at 84. On the rare occasions when he did an interview over the phone, he would certainly record it. *Id.* at 85 (stating that if Picketts did an interview over the phone, "that interview was recorded, always"), 98.

3. Ms. Swain's Rebuttal Evidence At 2011-12 Evidentiary Hearing

In rebuttal, Ms. Swain submitted three exhibits that were admitted by stipulation. *See* Excerpts from Defense Exhibits 6-8; Appendix I. The additional exhibits were excerpts of deposition transcripts of Picketts from the federal lawsuit, *Everson v. Calhoun County*, as well as some police reports made by Picketts, which were used as exhibits in the *Everson* depositions.[4]

In his deposition in *Everson*, Picketts admitted, contrary to the "habit" testimony of Gandy and Ford-Buscher, to conducting a phone interview of a witness and not making a written

[4] *Everson* involved a § 1983 claim by Linda Everson against Detective Picketts, among other defendants. 407 Fed Appx 885 (CA 6 2011). Everson had reported to the Calhoun County Sheriff that her then-boyfriend, a police officer, had forcibly sodomized her. *Id.* at 886. The boyfriend was never prosecuted, and Picketts instead sought an arrest warrant for Everson for filing a false police report. *Id.* The Sixth Circuit agreed that the case could go to trial, finding disputes of material fact about whether Picketts intentionally changed a witness's statement in his report and whether Picketts improperly influenced another witness's statement. *Id.* at 888. The case was resolved in Everson's favor after a jury trial, and she was awarded one million dollars. See "Jury awards former Battle Creek dispatcher $1 million in lawsuit involving Calhoun County Sheriff's Department," August 21, 2012; *available at*: http://www.mlive.com/news/kalamazoo/index.ssf/2012/08/former_battle_creek_dispatcher.html.

record of this interview even though the conversation was important. Def. Ex. 6 at Evid. Hrg. at 70, 73; App. I. When asked whether he took notes during interviews, Picketts stated, "Well, sometimes I do and sometimes I don't, but most of the time I'll make little notes for myself." *Id.* at 60. Picketts said that his notes from witness interviews are generally typed up as official reports by Sheriff Department staff, and then he throws his notes away and does not save them anywhere in the file. *Id.* at 60-61. Picketts also testified that whether a conversation was included in a report would "depend on what it entailed" and he was "not sure" if a specific conversation would have been included. *Id*. at 96.

E. Trial Court Order Granting Relief from Judgment

After receiving summation briefs from both parties, the trial court granted the Motion for Relief from Judgment based on Ms. Swain's *Brady* claim, her claim under MCL 770.1, and her actual innocence claim based on *Herrera v Collins*.[5]

Judge Sindt specifically found, after considering all of the evidence presented, that Dennis Book was credible and therefore concluded that the telephone interview between Picketts and Book did in fact occur, and that it was undisputed that this exculpatory conversation was not disclosed to the defense. Trial Court Opinion at 2-3; App. B. He found it clearly established that Ms. Swain did not learn that Book would have been an exculpatory trial witness until 2011; and that the prosecution and/or the police knew this at the time of trial and failed to disclose it. *Id.* at 4-6. Therefore, it was in fact newly discovered evidence of a *Brady* violation cognizable on a successive motion for relief from judgment. *Id.* at 6. Judge Sindt noted that, while the *Brady* standard does not require a showing of diligence from the defendant, Ms. Swain had nevertheless been diligent in pursuing Book's testimony. *Id.* at 5-6 (noting that Ms. Swain's father had asked

[5] Judge Sindt denied relief based on the two other claims in Ms. Swain's motion — ineffective assistance of appellate counsel and the recantation of Cody Swain.

Book to testify at the time of trial, and was rebuffed). Finally, the substance of the *Brady* evidence was in fact exculpatory to Ms. Swain and also had significant impeachment value because it decimated any credibility that Ronnie's original trial testimony would have had: the only other adult living in the house would deny that any of the events to which Ronnie testified could have occurred at all. See *id.* at 3-4, 8.

In granting relief, Judge Sindt wrote that, with the new evidence, "The validity and wisdom of the guilty verdicts which this Court has previously found to be unsupportable are called into even greater question." *Id.* at 5. Because the totality of the evidence in this case at this point so greatly undermines the original allegations against Ms. Swain, the trial court held that relief was also warranted under the "justice has not been done" standard of MCL 770.1 and under the actual innocence standard of *Herrera v Collins*. *Id.* at 11.

The prosecution filed a Delayed Application for Leave to Appeal in the Court of Appeals on January 31, 2013. The court granted the application on September 12, 2013.

F. Court of Appeals Decision Reversing Trial Court

On February 5, 2015, the Court of Appeals again reversed Judge Sindt's decision to grant Ms. Swain a new trial. Court of Appeals Opinion; App. A. Specifically, the Court of Appeals held that Judge Sindt abused his discretion in granting Ms. Swain relief because her motion was barred by MCR 6.502(G). Further, the Court of Appeals held that even assuming her subsequent motion was not barred, Judge Sindt abused his discretion in granting relief based on a *Brady* violation, MCL 770.1, and Ms. Swain's freestanding actual innocence claim.

Judge Cynthia Stephens concurred in the result and analysis as to the *Brady* violation and in the result only as to the actual innocence claim. Concurring Opinion; App. A. **Judge Stephens wrote separately to express her opinion that it was more likely than not that no reasonable**

juror would find Ms. Swain guilty based on the current record in the case. *Id.* [6]

ARGUMENT

STANDARD OF REVIEW

A trial court decision granting or denying a new trial is reviewed under the "abuse of discretion" standard. See, e.g., *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). Questions of law are reviewed *de novo*. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). "An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions." *Rao*, 491 Mich at 279. Additionally, in an appeal from a decision of the Court of Appeals, the appellant must show that "the decision is clearly erroneous and will cause material injustice" **or** "the decision conflicts with a Supreme Court decision." MCR 7.302(B)(5).

I. The Court of Appeals Clearly Erred in Holding that in Order to Satisfy MCR 6.502(G)(2), a Defendant Must Satisfy the Four Prongs of *Cress*, Even when the Defendant has not Raised a Substantive *Cress* Claim

Subchapter 6.500 of the Michigan Court Rules outlines the procedures governing post-conviction relief for defendants whose cases are no longer subject to appellate review. MCR 6.501. While MCR 6.502(G) generally prohibits more than one motion for relief from judgment under this subchapter, a defendant can file a second or subsequent motion if she meets one of the two exceptions stated in MCR 6.502(G)(2). The second exception, and the one on which Ms. Swain relies here, is satisfied when the defendant's claim is based on new evidence that had not

[6] The Court of Appeals first reversed Judge Sindt's order on December 11, 2014. However, on February 5, 2015, exactly 56 days after its original ruling, the Court of Appeals vacated its December 11 order and released a new opinion. Court of Appeals Opinion; App. A. The only change was the deletion of a sentence quoting language from a previous appellate decision. *Id.* at 8; Vacated Court of Appeals Opinion at 8; App. K.

been discovered prior to the first motion. A different section of the 6.500 rules provides the basis for relief from judgment once the gateway hurdle of MCR 6.502(G) is met. See MCR 6.508.

The Court of Appeals erred when it held that in order to satisfy MCR 6.502(G)(2), a defendant must satisfy the four prongs of *People v. Cress*, 468 Mich 678; 664 NW2d 174 (2003), even when the substantive claim for relief is not a *Cress* claim. Court of Appeals Opinion at 2-5; App. A. Whether the elements of a substantive *Cress* claim must also be met to surmount the procedural hurdle of MCR 6.502(G)(2) is a question of law that this Court reviews *de novo*. See *Hinkle v Wayne County Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002) ("The interpretation of a court rule is . . . a question of law and is reviewed de novo."). The principles of statutory interpretation are applied to the interpretation of court rules. *Id.*

MCR 6.502(G)(2) does not implicate *Cress*. It is a *procedural* gateway requirement that, if met, permits the defendant to file a subsequent motion for relief from judgment based on an underlying *substantive* claim. That underlying *substantive* claim might be, *or it might not be*, a claim under *Cress*. A *Cress* claim is a substantive claim on which relief can be granted, and it is an independent basis for obtaining relief based on new evidence, like independent claims under *Brady* or *Strickland*. In Ms. Swain's case, the underlying substantive claim is brought under *Brady*, and not under *Cress*.

Without explanation or citation, the Court of Appeals grafted the *Cress* requirements on to MCR 6.502(G)(2)—a rule that requires only that the evidence underlying the substantive claim "was not discovered before the first such motion." The Court of Appeals's reading is squarely foreclosed by: (A) the plain text of MCR 6.502(G)(2), (B) the Michigan Court Rules read as a whole, (C) the lack of authority from the Michigan Supreme Court, and (D) the requirements of the substantive constitutional claims brought under the rule.

A. The Court of Appeals's Interpretation Contradicts the Plain Language of the Court Rule.

The language of MCR 6.502(G)(2) is unambiguous and incompatible with the *Cress* test, and the Court of Appeals's interpretation contradicts the plain reading of the court rule. MCR 6.502 bars the filing of a second and subsequent motion for relief from judgment, unless the petitioner alleges an exception under MCR 6.502(G)(2). MCR 6.502(G)(2) states, in relevant part, that a defendant "may file a second or subsequent motion [for relief from judgment] based on . . . a claim of new evidence that was not discovered before the first such motion." If a judge determines an exception has been met, then the petition may then be filed. MCR 6.502(G). There is no ambiguity in this provision. This Court has highlighted the importance of adhering to plain language:

> [O]ur obligation is to discern and give effect to the Legislature's intent as expressed in the statutory language. If the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—**no further judicial construction is required or permitted**. . . .

Gladych v New Family Homes, 468 Mich 594, 597; 664 NW2d 705 (2003) (emphasis added) (internal quotations and citations omitted). An unambiguous court rule is to be enforced as written. *Swain*, 288 Mich App at 634.

The text of MCR 6.502(G)(2) is clear: the rule is satisfied when a defendant's claims are based on evidence not known to her when she filed her prior motion. The text—"new evidence that *was not discovered* before the first such motion"—does not require a showing that she *could not have discovered* the evidence with due diligence. Evidence under MCR 6.502(G)(2) either has been discovered before the previous motion or it has not; the provision uses the words "was not," and that clear phrase should not be arbitrarily converted to "could not have been."

Cress, on the other hand, does require a showing of diligence. *Cress*, 468 Mich at 692 ("For a new trial to be granted on the basis of newly discovered evidence, a defendant must show

that . . . the party could not, using reasonable diligence, have discovered and produced the evidence at trial . . . .”). Thus, MCR 6.502(G)(2), its plain language, is simply different than the *Cress* standard.

B. The Court of Appeals's Interpretation is Foreclosed by a Holistic Reading of the Michigan Court Rules.

Application of *Cress* to MCR 6.502(G)(2) is not just inconsistent with the plain language of that provision, but it also makes no sense when read in the context of Subchapter 6.500 and the Court Rules as a whole. See *Houston v Governor*, 491 Mich 876, 878; 810 NW2d 255 (2012) (“[A statutory provision] should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the Act as a whole.”) (internal quotation omitted).

1. *MCR 6.500 Read as a Whole Undermines the Court of Appeals's Interpretation Because Diligence is Addressed Later in the Subchapter.*

While MCR 6.502(G)(2) addresses the circumstances under which a defendant may *file* a second or subsequent motion for relief from judgment, MCR 6.508(D)(3) explains when courts may *grant relief* for such motions. MCR 6.508(D)(3), in stark contrast to MCR 6.502(G)(2), does address the discoverability of evidence. It provides, “[t]he court may not grant relief to the defendant if the motion . . . alleges grounds for relief . . . which **could have been raised** [previously] . . . unless the defendant demonstrates . . . good cause . . . [and] actual prejudice.” (Emphasis added). The difference in the language is not accidental. See *United States Fid Ins & Guar Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 14; 795 NW2d 101 (2009) (“[T]he use of different terms . . . generally implies that different meanings were intended.”). Thus, while a claim in a successive motion can be *filed* if it is based on evidence not previously discovered,

MCR 6.508(D)(3) states, in part, that one way claims can *succeed* is if the claim could not have been raised earlier (e.g., unless cause and prejudice can be shown).[7]

2. This Court has Explicitly Included Diligence Requirements Elsewhere in the Michigan Court Rules.

Additionally, this Court—the drafter of the court rules—has shown that it knows how to implement a diligence requirement when one was intended, and reading such a requirement into an otherwise silent provision would be inappropriate. See *Gladych*, 468 Mich at 597 ("If the language is unambiguous, . . . no further judicial construction is required or permitted."). Chapter 2 of the Michigan Court Rules references "diligence" nine times; Chapter 3 makes three references; and Chapters 4, 5, and 9 make one such reference each. If this Court meant to include a diligence requirement in MCR 6.502(G)(2), it would have done so explicitly as it has done elsewhere in Subchapter 6.500 and throughout the Michigan Court Rules. [8]

C. The Lack of Authority for Grafting the *Cress* Requirements onto MCR 6.502(G)(2) Claims Further Undermines the Interpretation of the Court of Appeals.

While the Court of Appeals wrote it was not aware of any authority for Ms. Swain's contention that *Cress* is not applicable to MCR 6.502(G)(2),[9] Court of Appeals Opinion at 5; App. A, the Court of Appeals failed to cite any authority for its own interpretation either. The reason is simple: there is no authority either way on this issue because the Court of Appeals's application of *Cress* onto MCR 6.502(G)(2) is a baseless innovation.

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[7] This distinction is important for defendants like Ms. Swain because MCR 6.508(D)(3) permits the court to waive the "good cause" requirement if there is a significant possibility of the defendant's innocence. Thus, even if a court *were* to find that she lacked good cause for failure to raise her claim on a prior motion, the MCR 6.508(D)(3) exception would allow it to surpass the procedural hurdles and be heard on the merits.

[8] See, e.g., MCR 2.611(A)(1)(f) ("Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial.").

[9] The panel below failed to acknowledge that the published *Swain* opinion of 2010 had agreed that Ms. Swain's interpretation of the rules has "merit." *Swain*, 288 Mich App at 633–34.

The *Cress* court never indicated its decision was meant to construe MCR 6.502(G)(2), nor has this Court ever indicated that it intended for the requirements of *Cress* to become a new MCR 6.502(G)(2) standard. *Cress* is, and has always been, a substantive claim for relief that has its own requirements, like *Brady* or *Strickland*, that are wholly distinct from the separate procedural requirements of MCR 6.502(G)(2). But for the similarity of the phrases "new evidence" and "newly discovered evidence," no court would consider equating the two rules as the Court of Appeals did here.

Cress does not make sense as an interpretive tool for MCR 6.502(G)(2) because *Cress* itself was not a subsequent motion for relief from judgment.[10] Indeed, the Court in *Cress* explained that it was discussing the requirements for *granting a new trial* based on "newly discovered evidence," *Cress*, 468 Mich at 692, that could not have been discovered before trial. *Cress* did not concern *filing a subsequent motion* based on "new evidence" discovered after the previous 6.500 motion. MCR 6.502(G)(2). *Cress* therefore never cited MCR 6.502.

In every case where this Court has cited *Cress* or one of its major predecessors[11] for the familiar four-prong test, it has done so to evaluate motions based on *substantive* new evidence claims. **This Court has never applied the *Cress* test as a gateway to evaluate whether a different underlying substantive claim** (such as *Brady* or *Strickland*) may be procedurally

[10] The motion for relief from judgment that was at issue in this Court's 2003 *Cress* opinion was filed in 1997. *Cress*, 468 Mich at 682. MCR 6.502(G)(1) states that one motion may be filed after August 1, 1995, "regardless of whether a defendant has previously filed a motion for relief from judgment." The 1997 motion for relief from judgment was the first one filed after August 1, 1995 in that case. See *Cress v Palmer*, 484 F3d 844, 847 (CA 6 2007) (noting that Cress's prior "post-conviction relief in state court" was sought prior to 1989). Therefore, this Court's 2003 *Cress* opinion addressed what was, for the purposes of MCR 6.500 *et seq*, a first motion for relief from judgment.

[11] The four-prong newly discovered evidence test originated in *Canfield v City of Jackson*, 112 Mich 120; 70 NW 444 (1897) and was maintained in *People v Clark*, 363 Mich 643; 110 NW2d 638 (1961), as well as several other cases through the years, leading up to *Cress* in 2003.

presented to the court in a motion under MCR 6.500 *et seq.* The complete lack of authority from this Court permitting such a tortured interpretation of MCR 6.502(G)(2) reinforces Ms. Swain's contention that the language should be enforced as written, and "no further judicial construction is required or permitted." *Gladych*, 468 Mich at 597. *See also*, *supra* Part I.A.

D. Applying *Cress* to MCR 6.502(G)(2) Will Undermine the Rights of Defendants Alleging Constitutional Violations, Including *Brady* Claims as Clarified Recently by this Court in *Chenault*.

The collateral damage of the Court of Appeals's interpretation further supports that such an interpretation cannot possibly have been intended by this Court. See *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999) (noting that court rules and statutes "must be construed to prevent absurd results."). Grafting *Cress* onto MCR 6.502(G)(2) will bring significant negative consequences to a large class of defendants: those bringing constitutional claims in subsequent motions for relief from judgment. The consequences for defendants bringing substantive *Brady* claims (as in this case) and *Strickland* claims demonstrate just how unsuitable *Cress* is as an interpretive tool for MCR 6.502(G)(2).

1. Requiring Fulfillment of Cress *for an MCR 6.502(G)(2) Claim Alleging a* Brady *Violation Undermines the Constitutional Rights Protected by* Brady *and Reinforced by this Court in* Chenault.

Grafting *Cress* onto MCR 6.502(G)(2) undermines the constitutional rights of defendants whose underlying substantive claim is a *Brady* claim by adding a diligence requirement where it is constitutionally unacceptable. As this Court recently said in *People v Chenault*, 495 Mich 142, a defendant cannot be required to show diligence in order to establish a *Brady* violation:

> In *People v Lester* . . . the Court of Appeals adopted a four-factor test that added a requirement of defendant diligence to the traditional *Brady* test. Neither the Supreme Court of the United States nor this Court has endorsed this element. We hold that a diligence requirement is not supported by *Brady* or its progeny. Thus, we overrule *Lester* and reaffirm the traditional three-factor *Brady* test.

Id. at 145–46. Although *Brady* has no diligence requirement, the Court of Appeals's reading of MCR 6.502(G)(2) would explicitly require diligence on the part of defendants bringing *Brady* claims on subsequent motions for relief from judgment. Thus, according to the Court of Appeals, if the defendant learned of the *Brady* violation before filing her first motion, she would be given the full vindication that *Brady* calls for, but simply because the prosecution managed to keep hidden the exculpatory evidence until after she files her first 6.500 motion, her constitutional rights are circumscribed. Such an outcome makes no sense. Indeed it violates the very premise of the *Brady* rule as articulated by the U.S. Supreme Court: "A rule thus declaring prosecutor may hide, defendant must seek, is not tenable in a system constitutionally bound to accord defendants due process." *Banks v Dretke*, 540 US 668, 696; 124 S Ct 1256; 157 L Ed 2d 1166 (2004) (internal quotation omitted). *Chenault* emphasized that "[a]dding a diligence requirement to this rule undermines the fairness that the rule is designed to protect." *Chenault*, 495 Mich at 155. Requiring fulfillment of the *Cress* test to satisfy MCR 6.502(G)(2) adds the very same diligence requirement *Chenault* and *Banks* tell us has no place in the *Brady* analysis.

Rather than encouraging the prosecution to turn over potentially exculpatory evidence, as *Brady* and *Chenault* were designed to do, the Court of Appeals's interpretation of the rules provides an incentive for prosecutors to conceal evidence until the defendant has filed her first motion, after which establishing a *Brady* violation becomes much more difficult. Although *Chenault* made clear that such "unwarranted concealment should attract no judicial approbation," *Id.* at 155, the Court of Appeals's reading ensures that it will.

The consequences of grafting *Cress* onto MCR 6.502(G)(2) for underlying *Brady* claims show that the Court of Appeals's reading could not have been intended. First, it puts the heaviest burden—a showing of diligence—on defendants whose evidence has been suppressed the longest, while those who learn of a *Brady* violation earlier are subject to no such requirement.

Second, determining which defendant is subject to which burden depends solely on chance, leading to different outcomes for identically situated defendants. Consider, for example, co-defendants in the same case who learn of a *Brady* violation at exactly the same time. Based only on whether or not they have already filed 6.500 motions, one may be granted full relief while the other is barred from bringing the claim at all.

2. The Effect of the Court of Appeals's Interpretation Would Also be Egregious and Unacceptable in Strickland *Claims.*

This Court should also consider the stark consequences of the Court of Appeals's new rule engrafting *Cress* onto MCR 6.502(G)(2) in the ineffective assistance of counsel context. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

To satisfy *Strickland*, a defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 669. But under the test set forth by the Court of Appeals, if a defendant raises a *Strickland* claim in a successive motion, she would also have to prove that the new evidence supporting her claim could not have been found with reasonable diligence before trial. But if this were true, then ineffective assistance of counsel claims based on counsel's failure to investigate could never be brought in a subsequent motion for relief from judgment: While *Strickland* would mandate relief because counsel lacked diligence in failing to previously discover the evidence, the new *Cress* corollary to MCR 6.502(G)(2) would deny relief for that very same reason. A defendant's constitutional right to relief under *Strickland* would simply collapse if a defendant must prove diligence in a claim that substantively requires proving the lack of diligence. Again, this Court could certainly have never intended this absurd outcome. *Rafferty*, 461 Mich at 270.

II. Under the Correct Interpretation of the Rules, the Exculpatory Phone Interview Would Qualify as New Evidence Within the Meaning of MCR 6.502(G)(2) Because it was Not Discovered Before Ms. Swain's Current Motion for Relief from Judgment.

MCR 6.502(G)(2) permits successive motions to be heard where the defendant presents "new evidence that was not discovered before the first such motion." The record here establishes that the evidence of the *Brady* violation was not discovered before the prior motion. The new evidence at issue here is the exculpatory phone call between Detective Picketts and Book, in which Book told Picketts that Ms. Swain did not commit the alleged abuse. As Book testified, he did not convey to Ms. Swain the fact that he had given an exculpatory interview to Detective Picketts (before trial) until early 2011, well after Ms. Swain had filed her prior motion. EH, 12/20/2011, at 16.

The Court of Appeals incorrectly framed the evidence underlying the *Brady* claim as "Book's personal knowledge of events in the trailer" and concluded that it was not newly discovered because Ms. Swain already knew of his potential testimony. Court of Appeals Opinion at 4; App. A. This characterization of the evidence is inappropriate for many reasons; for one, it is incompatible with *Brady* itself. See discussion *infra* Part III.A.i. The correct description of the evidence at issue is the exculpatory interview between Picketts and Book. Because the prosecution did not turn over information regarding this exculpatory interview in violation of *Brady*, and because Book did not tell Ms. Swain about the interview until 2011, which was well after Ms. Swain filed her first motion, the evidence is new and cannot be said to have been discovered at the time of the first motion.[12]

[12] Even if, contrary to the plain language and intent of MCR 6.502(G)(2), Ms. Swain had to show that Book's exculpatory testimony was not "discoverable" at the time of her prior motion, she easily meets that standard. As discussed above and as Judge Sindt found, Ms. Swain could not find out that Book had exculpated Ms. Swain in a conversation with Detective Picketts,

III. The Court of Appeals Erred in Reversing the Trial Court's Decision to Grant Ms. Swain Relief from Judgment Because the Prosecution Withheld Material and Exculpatory Evidence—the Phone Call with Book—in Violation of the Fourteenth Amendment and *Brady v Maryland*.

In addition to improperly assessing MCR 6.502(G)(2) under the *Cress* standard, the Court of Appeals clearly erred in its application of *Brady*. The Court of Appeals incorrectly defined the evidence at issue. Further, Judge Sindt's ruling was not abuse of discretion.

A. The Court of Appeals Misapplied and Misread *Brady*: it Incorrectly Defined the Evidence at Issue, Thereby Undermining the Reasoning in *Brady*, and Read in Unwarranted Requirements on Defendants.

The Court of Appeals incorrectly defined the evidence at issue in the *Brady* claim. Judge Sindt defined the evidence as a phone call where "Book told Picketts . . . [Ms. Swain] did not commit the crimes with which she was charged and ultimately convicted." Trial Court Opinion at 5; App. B. While the call may be inadmissible hearsay, it would ultimately lead to Ms. Swain calling Book to testify. But because the phone call was never disclosed, Ms. Swain did not know the certainty or honesty with which Book was willing to testify, and as the record at the hearing made clear, she had many reasons to think he would be a hostile witness. Thus, Judge Sindt found "the evidence at issue is that Book was, at the time of the trial, a favorable defense witness. Picketts knew it; the defendant did not." *Id.* at 5.

However, the Court of Appeals misunderstood *Brady* and defined the evidence at issue as "Book's personal knowledge of the events."[13] This narrow interpretation (1) is foreclosed by the reasoning in *Brady* itself, (2) places a burden on defendants that is unsupported by *Brady*, and (3) leads to absurd consequences.

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nor could she find out that he would testify that the alleged abuse never occurred while he lived in the trailer, because Book flatly refused to communicate with Ms. Swain and her agents. Trial Court Opinion at 5–6; App. B.

[13] Court of Appeals Opinion at 4; App. A. ("Book's personal knowledge of events at the trailer and his observation of defendant's behavior with her sons.").

1. The Court of Appeals's Reasoning is Foreclosed by Brady.

The Court of Appeals's interpretation is foreclosed by the reasoning in the seminal case establishing the standard, *Brady v Maryland*. In *Brady*, the U.S. Supreme Court held that a due process violation occurred. Had the Court in that case defined the evidence as a witness's personal knowledge, there would have been no violation. **The Court of Appeals's application of *Brady* would deem *Brady* itself to be wrongly decided**, and therefore cannot be the correct interpretation.

In *Brady*, the exculpatory statement was a confession by defendant's accomplice that he actually strangled the victim. *Brady v Maryland*, 373 US at 86. The defendant conceded he had conspired with the accomplice to rob the victim, but had consistently argued that the accomplice committed the actual murder. *Brady v State*, 226 Md 422, 425; 174 A2d 167, 168 (1961). Thus, even before the state eventually turned over the confession, the defendant knew the accomplice had personal knowledge of the murder. **In other words, he already knew the information contained in the *Brady* material, but the U.S. Supreme Court did not find that to be a barrier.**

Here, the Court of Appeals reasoned there was no *Brady* material because the evidence was Book's "personal knowledge," and Ms. Swain therefore, "knew the essential facts of Book's potential testimony." Court of Appeals Opinion at 4–5; App. A. In *Brady*, the defendant knew the essential facts of the accomplice's potential testimony because the defendant was present during the murder and had witnessed the accomplice commit the crime. But in *Brady*, despite defendant's knowledge, the court correctly found the prosecution's failure to disclose the confession to be "a violation of the Due Process Clause." *Brady*, 373 US at 86. **Here, as in *Brady*, the evidence at issue is not Book's personal knowledge, but rather the information that the government had and the defendant did not — the phone call where Book told**

police Ms. Swain was innocent.

2. The Court of Appeals's Reasoning Improperly Places a Burden on the Defendant that is Unsupported by Brady.

In mischaracterizing the evidence at issue and misconstruing *Brady*, the Court of Appeals improperly places a burden on the defendant that is unsupported by *Brady*. Specifically, the Court of Appeals's interpretation of what information the disclosure "would lead to" imposes a requirement that if the defendant knows of a potential witness — whether she knows what the testimony will be, or whether the witness is inculpatory or exculpatory — she cannot establish a *Brady* claim. If a defendant knows of a witness's personal knowledge, the Court of Appeals expects the defendant to call that witness to testify or be barred from bringing a *Brady* claim.

The Court of Appeals erred in holding Ms. Swain knew Book was a "favorable" witness. Ms. Swain and trial counsel "knew of Book's presence in the trailer during a portion of the relevant period, and they knew that he would be aware that abuse had not occurred in his presence." Court of Appeals Opinion at 2; App. A.[14] The Court of Appeals then reasoned that because Ms. Swain knew of this personal knowledge, the *Brady* violation would not have led to any additional exculpatory information. *Id.* at 5 ("[D]efendant would not have obtained "additional" information because the only information that the telephone conversation might have led to was information already known to defendant . . . .").

The Court of Appeals's reasoning ignores the fact that Ms. Swain did not know what Book would say on the stand (indeed she had every reason to believe that he would say harmful

[14] In finding Ms. Swain had knowledge of the *Brady* evidence in question, the Court of Appeals analogized to *Benge*. In *Benge*, defendant "knew the essential facts that would have permitted him to take advantage of [the witness's] allegedly exculpatory evidence." *Benge v Johnson*, 474 F3d 236, 243 (CA 6 2007). Here, the essential fact—that Book would testify truthfully under oath—was not known to Ms. Swain. Because Book refused to discuss the case with Ms. Swain or her father, Ms. Swain could not have known what Book's testimony would be without being informed about the phone call.

things), and thus she did not know what his potential testimony would be. The trial court, correctly, understood and gave weight to this important distinction. Trial Court Opinion at 5–6; App. B.

While Ms. Swain knew Book would know the truth, that she did not commit the alleged abuse, **she did not know what his testimony would be** because he was extremely hostile to her. She had reason to fear that his hostility would cause him to testify unfavorably. See, e.g., EH 12/20/2011 at 13-14, 42-43, 68-71; EH 04/46/2012 at 6-7, 39-42. When Ms. Swain's father reached out to Book, Book "told him [he] didn't want nothing to do with it" because he was "still pretty angry with her . . . ." EH 12/20/2011 at 71.

Despite indications that Book would not testify favorably, the Court of Appeals reasoned that Ms. Swain should have called Book to testify and is now barred from *Brady* relief for her failure to do so. Court of Appeals Opinion at 5; App. A ("[T]he only information that the telephone conversation might have led to was information already known to defendant, information which **she chose not to avail herself of** when she decided not to call Book to the stand.") (Emphasis added). This reasoning cannot possibly prevail because it would force defendants to call potentially harmful witnesses to the stand in order to later avail themselves of exculpatory evidence withheld by the state.

The appellate court's erroneous reasoning is suggestive of a diligence requirement under *Brady*, which this Court has expressly repudiated, as discussed above. *Chenault*, 495 Mich 142, 146. The appellate court's erroneous reading in this case is unsurprising to the extent that the Court of Appeals has, despite *Chenault*, shown resistance to correctly applying *Brady*.[15]

[15] *See, e.g.*, *People v Wood*, No. 315379, --NW2d--; 2014 WL 5470590 (Mich Ct App Oct. 28, 2014) ("To establish a *Brady* violation, a defendant must prove . . . (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence[.]"); *People v Wesson*, unpublished opinion per curiam of the Court of

3. The Court of Appeals's Reasoning Leads to Absurd Consequences.

The Court of Appeals's reasoning, when taken to its logical conclusion, leads to absurd results: disclosure requirements under *Brady* would vary based on the events at trial. Had Ms. Swain called Book to the stand, and had Book changed his story to make inculpatory statements, at that point the phone call would have become valuable impeachment testimony. A prosecutor would have to disclose such important impeachment evidence. See *Banks*, 540 US at 702 (rejecting the argument that no *Brady* violation had occurred when the police withheld impeaching evidence even though the witness was impeached at trial by other evidence). But obligations to disclose exculpatory information should not change based on the events at trial. That would be impractical given that police must disclose exculpatory information to prosecutors and prosecutors are obligated to disclose that information **before trial**. The Court of Appeals's reasoning is at odds with the explicit duty on prosecutors to disclose. *Chenault*, 495 Mich. at 154 ("[W]hen confronted with potential *Brady* evidence, the prosecution must always err on the side of disclosure."). The correct understanding is that Book's statements to the police were always exculpatory and should always have been disclosed before trial.

B. The Court of Appeals Erred in Finding that Ms. Swain had not Established a *Brady* Violation and Failed to Apply the Appropriate Deferential Review; Judge Sindt's Ruling was not Abuse of Discretion.

Judge Sindt's decision to grant Ms. Swain relief from judgment—because the prosecution withheld material and exculpatory evidence—was not an abuse of discretion. The Court of Appeals's review of the trial court's decision to grant the motion was limited to abuse of discretion. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). An abuse of

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Appeals, issued Dec. 16, 2014 (Docket No. 318746), p. 3 ("Further, defendant has not shown that he could not have obtained the video, if it existed, from the county jail himself."); *People v Clark*, unpublished opinion per curiam of the Court of Appeals, issued June 19, 2014 (Docket No. 313121), p. 2 (considering, incorrectly, whether suppression was deliberate, contrary to *Strickler*, 527 US at 282). All attached as Appendix J.

discretion "occurs only when the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999) (internal citations omitted).

Judge Sindt did not abuse his discretion when he found Ms. Swain met the requirements of *Brady*, and granted her motion. As *Chenault* recently reinforced, there are only three prongs "of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v Greene*, 527 US 263, 281-82, 119 S Ct 1936, 1948, 144 L Ed 2d 286 (1999); *Chenault*, 495 Mich 149-50. Further, actions by the police are imputed to the prosecutor. *Kyles v Whitley*, 514 US 419, 437; 115 S Ct 1555; 131 L Ed 2d 490 (1995).

Ms. Swain satisfies the three components of a *Brady* violation, as follows.

1. Dennis Book's Conversation with Detective Picketts was Suppressed by the Government.

Based on credibility determinations, Judge Sindt determined that the phone call had occurred. Trial Court Opinion at 4; App. B. Judge Sindt further recognized that, "[t]here is no dispute that [the phone call] was not disclosed." *Id.* The Court of Appeals did not disturb these factual findings.

2. The Information the Police Withheld was Favorable to the Defense.

The evidence in question—i.e., the government's knowledge that Book would have been a favorable witness for Ms. Swain—was plainly favorable to Ms. Swain. At trial, the defense did not call Book because, given Book's intense hatred of Ms. Swain, the defense reasonably

believed that Book would not be a favorable defense witness. While he would know the truth of Ms. Swain's innocence, Ms. Swain had legitimate reasons to think that, if she subpoenaed him, he would hurt her case. This belief was reinforced by the fact that when Ms. Swain's father went to Book's home and attempted to speak with him, Book rebuffed him. EH 12/20/2011 at 71.

However, the knowledge that the government had changes that calculus entirely. Despite Book's open hostility and his outright refusal to even talk to Ms. Swain or her agents at the time of trial, had the defense known about the exculpatory interview he gave to Picketts, trial counsel would have subpoenaed Book and put him on the stand, no matter how much he might hate Ms. Swain. EH 04/26/2012 at 9, 11. If the exculpatory interview had been disclosed, the defense would have had an important safety net even if Book wavered: he could easily have been impeached by that prior statement given to Picketts. More than that, Book confirmed that while he did not want to testify for Ms. Swain, he would have told the truth (that Ronnie's claims of sexual abuse were false) if he had been subpoenaed and ordered to testify at trial. EH 12/20/2011 at 14. Obviously the evidence he would have provided, *that the government knew he would have provided*, would have been favorable to the defense.

Book, an adult who was in the house for much of the time during which the alleged sexual assaults were supposedly occurring every weekday, testified at the evidentiary hearing that he told Detective Picketts in no uncertain terms that the allegations against Ms. Swain were false. EH 12/21/2011 at 12, 15. Judge Sindt noted:

> It is important to note that Ronnie Swain testified that the Defendant sexually abused him daily on school days while living at the residence in the mornings before he was picked up by the school bus . . . not only is [Book's] testimony direct evidence of the Defendant's innocence, it is also evidence which attacks the credibility of Ronnie Swain. It is exculpatory evidence by either definition which there is a duty, based on *Brady*, to disclose.

Trial Court Opinion at 4 (emphasis in original); App. B. At trial, Ronnie testified that the abuse

happened *every single weekday*. Trial Tr. Aug. 13, 2002, Vol. II 159, 167-168. Testimony that proves no abuse could have occurred on the vast majority of those days, even if it does not cover every single one, destroys Ronnie's original (and now recanted) story, and the prosecution's entire theory of the case as presented at trial. The trial court came to this same conclusion, and it cannot be deemed abuse of discretion.

This evidence is not merely cumulative impeachment of Ronnie, as Book's testimony wholly rebuts that the alleged crime ever happened. Trial Court Opinion at 4; App. B. The U.S. Supreme Court has specifically held that a *Brady* violation can exist even if a witness has already been impeached in other ways. See *Banks*, 540 US at 702 (rejecting the argument that no *Brady* violation had occurred when the police withheld impeaching evidence even though the witness was impeached at trial by other evidence).

Overall, because Dennis Book's testimony would wholly rebut the allegation that the abuse happened and because it would severely damage the credibility of Ronnie Swain, Judge Sindt reasonably determined that the suppressed evidence was in fact material and exculpatory.

3. Prejudice Ensued from the Government's Failure to Disclose the Information it Learned through Picketts's Interview of Book.

Prejudice resulted in this case because had Book testified at Ms. Swain's trial, there is a reasonable probability that the jury would have acquitted Ms. Swain. Failure to turn over exculpatory information to the defense requires a new trial as long as there is a "reasonable probability" that the suppressed information could have led to a different result. *Kyles*, 514 US at 434. The U.S. Supreme Court has noted that "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *United States v Agurs*, 427 US 97, 113; 96 S Ct 2392; 49 L Ed 2d 342 (1976).

In this case, Ms. Swain's verdict was of questionable validity. There was neither physical

evidence nor any eyewitnesses to corroborate Ronnie Swain's testimony. Ronnie's testimony itself was already questionable: Ronnie admitted that he had told family members that his allegations against his mother were untrue and that he had only made the allegations after he was himself accused of sexual misconduct. See Trial Court Opinion at 4; App. B (finding Ronnie's credibility at trial was "obviously tenuous"). The questionable validity of Ms. Swain's conviction is evidenced by the fact the jury deliberated for over two days and only reached a verdict after receiving deadlocked jury instructions. See July 21, 2009 Trial Court Opinion at 3; App. D.

The importance of Book's testimony cannot be overstated. Book was the only other adult in the home besides Ms. Swain during the mornings of the alleged abuse. Thus, he was clearly in a position to know what happened on the mornings when Ronnie claimed Ms. Swain abused him. Given the questionable credibility of Ronnie, the lack of corroborating physical evidence and eyewitnesses, and the difficulty the jury had in finding Ms. Swain guilty in the first place, Judge Sindt reasonably found that upon retrial, with the benefit of Book's testimony, there is a reasonable probability that Ms. Swain would have been acquitted.

The Court of Appeals erred in concluding "the only information that the telephone conversation might have led to was information already known to defendant, information which she chose not to avail herself of when she decided not to call Book to the stand." Court of Appeals Opinion at 5; App. A. This conclusion is not supported by the record. As Judge Sindt noted, "[t]his court finds that, at the time of trial, [Ms. Swain] had every reason to think Book would not assist in her defense and no reason to think that he would." Trial Court Opinion at 6; App. B. That finding must be given deference under abuse of discretion review. The information that Book would be a helpful witness—because he would testify truthfully despite his hostility to Mr. Swain—was a fact not known to the defense.

IV. Given Ms. Swain's Strong Showing of Actual Innocence, this Court Should Recognize the Existence of an Actual Innocence Gateway or a Freestanding Actual Innocence Claim in Michigan.

Despite her belief that Ms. Swain could make a successful showing of actual innocence,[16] Judge Stephens of the Court of Appeals concurred with the majority's result because she agreed that there is "no authority for an independent actual innocence standard in Michigan." Concurring Opinion; App. A. When this Court granted leave in *People v Garrett*, it suggested an interest in deciding the nature of relief available when post-conviction evidence demonstrates a significant possibility of a defendant's actual innocence. 493 Mich 949; 828 NW2d 26 (2013).[17] However, because it summarily affirmed the lower court holding on procedural grounds in *Garrett*, the status and proper treatment of actual innocence claims in Michigan courts remains unclear today.

This Court has also indicated interest in the actual innocence question previously in Ms. Swain's case. In its 2009 remand order, this Court directed the Court of Appeals to consider whether denying relief to Ms. Swain under MCR 6.502(G)(2) implicated her constitutional rights, given the trial court's finding at that time that there was a significant possibility of her innocence. *People v Swain*, 485 Mich 997. The Court of Appeals did not decide the question because it found that even if her rights were implicated, Ms. Swain could not establish the requisite showing of actual innocence—that "it is more likely than not that no reasonable juror

[16] "[T]he proofs in this case are such that . . . it is more likely than not that no reasonable juror would have found the defendant guilty." Concurring Opinion; App. A.

[17] Specifically, this Court asked for briefing on: (1) what standard Michigan courts should apply in considering a defendant's assertion that evidence demonstrates a significant possibility of actual innocence in the context of a motion brought pursuant to MCR 6.508; (2) whether MCR 6.500, *et seq*. or another provision, provides a basis for relief where a defendant demonstrates a significant possibility of actual innocence; and (3) whether, under the United States or Michigan Constitutions, evidence demonstrating a significant possibility of actual innocence can form an independent basis for post-conviction relief.

would have found guilty beyond a reasonable doubt." *Swain*, 288 Mich App at 637-38.

The record has changed significantly since 2010 and Judge Stephens is right to note that, as it stands today, no reasonable juror would be able to find Ms. Swain guilty beyond a reasonable doubt. Not only is Ms. Swain's innocence clear from the several distinct lines of testimony undermining the initial allegations and the complete lack of inculpatory evidence, it is also sworn to by the complainant himself. Moreover, Judge Sindt, who presided over Ms. Swain's trial and every subsequent proceeding in the case, has *twice* ruled that he is convinced of her innocence. See 2012 Trial Court Opinion at 7 ("That 'significant possibility' [of innocence] continues to exist in this case, even more so than the first time this Court made that determination . . . . **This Court has no doubt about it**.") (Emphasis added). This case presents the perfect opportunity for this Court to consider settling this open question by recognizing an avenue for relief based on a defendant's legitimate claim of actual innocence.

This Court should therefore answer "yes" to the question it posed to the Court of Appeals in 2009. There are several avenues through which Ms. Swain's rights may be implicated, even if her claims are barred by MCR 6.502(G)(2), and Ms. Swain meets the requisite showing for each of them. This Court should first consider adopting the reasoning of *Schlup v Delo* to create an actual innocence gateway through which procedurally defaulted claims may be adjudicated on the merits. Alternatively, this Court should consider the existence of a freestanding claim of actual innocence in Michigan under *Herrera v Collins*, the Michigan Constitution, or MCL 770.1.

A. *Schlup v Delo*: Gateway Actual Innocence Claim

Ms. Swain should be entitled to review on the merits of all constitutional claims that may be procedurally defaulted under MCR 6.502(G)(2) because she satisfies the gateway actual

innocence standard of *Schlup v Delo*, 513 US 298, 327; 115 S Ct 851; 130 L Ed 2d 808 (1995). The federal courts have long recognized that procedural bars must yield to prevent the incarceration of an innocent person. The U.S. Supreme Court has said:

> The [procedural bar for claims forfeited under state law] is not, however, unqualified . . . the Court recognizes a miscarriage-of-justice exception. In appropriate cases, the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration.

House v Bell, 547 US 518, 536; 126 S Ct 2064; 165 L Ed 2d 1 (2006) (emphasis added) (internal citations omitted). Moreover, the U.S. Supreme Court "has adhered to the principle that habeas corpus is, at its core, an equitable remedy. [That] Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata." *Schlup*, 513 US at 319. For the same reasons, this Court should find an actual innocence exception exists for procedurally defaulted state claims.

The standard for a gateway showing of actual innocence in post-conviction cases is whether "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 US at 327. In making this determination, a court should not consider the new evidence in a vacuum. *Id.* at 324. Rather, the "court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted . . . at trial." *Id.* at 327–28. Here, given the amount of new evidence that has come to light—the two recantations, the multiple new eye-witnesses, and the discovery of a suppressed phone call of yet another exculpatory eye-witness—this case is exactly the type that warrants review despite any procedural default.

B. *Herrera v Collins*: Freestanding Actual Innocence Claim

This Court should recognize a freestanding actual innocence constitutional claim based

on *Herrera v Collins*, 506 US 390; 113 S Ct 853; 122 L Ed 2d 203 (1993), as many sister states have done. In *Herrera*, the United States Supreme Court assumed, without deciding, that the "execution of an innocent person would violate the Constitution." *Carriger v Stewart*, 132 F3d 463, 476 (CA 9 1997). The Ninth Circuit noted that, culling the views presented in the different opinions of the *Herrera* court, a majority of justices would have explicitly held that execution of an actually innocent person would violate the Constitution. *Id.*

Herrera strongly suggested that a freestanding actual innocence claim would also apply in non-capital cases. *Herrera*, 506 US at 405 ("It would be a rather strange jurisprudence . . . which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison."). See also *Robinson v California*, 370 US 660, 667; 82 S Ct 1417; 8 L Ed 2d 758 (1962) (suggesting that imprisoning an innocent person for even one day would be cruel and unusual punishment). It is fundamentally unfair to punish an innocent person for a crime she did not commit, whether the person is sentenced to death, to life in prison, or to Ms. Swain's sentence of 25 to 50 years. Indeed, the Ninth Circuit and the Texas Court of Criminal Appeals have rejected the idea that freestanding actual innocence claims are limited to capital cases. See, e.g., *Jones v Taylor*, -- F3d --, 2014 WL 4067217 *3 (CA 9 2014); *Ex parte Elizondo*, 947 SW2d 202, 204-05 (Tex Crim App 1996).

As cited below, at least three states, California, Connecticut, and Texas, have recognized freestanding actual innocence claims under the federal Constitution based on the language in *Herrera*. For several other states, including Illinois, New Mexico, and New York, *Herrera*'s reasoning informed the decision to recognize freestanding actual innocence claims under their own state constitutions. See discussion *infra*, Part IV.C.

Because Ms. Swain can easily satisfy whatever "extraordinarily high" threshold showing this Court may find *Herrera* requires, as the trial judge who has overseen every aspect of this

case has definitively concluded, see *infra* Part IV.E, her case presents the perfect opportunity for this Court to recognize the existence of a freestanding claim of actual innocence in Michigan.

C. Michigan Constitution

Ms. Swain should be entitled to relief based on a freestanding innocence claim under the Michigan State Constitution. Several states—including California, Connecticut, Illinois, Missouri, New Mexico, New York and Texas—recognize freestanding actual innocence claims under their state constitutions even if the U.S. Supreme Court has yet to explicitly note those protections in the federal Constitution.[18] This Court's precedent already indicates a willingness, in some circumstances, to grant necessary constitutional protections that the U.S. Supreme Court may not yet have explicated. *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992). In *Bullock*, this Court recognized its "authority to interpret the Michigan Constitution more expansively than the United States Constitution." *Id.* The Court therefore court struck down a penalty despite a U.S. Supreme Court holding that the penalty was not unconstitutional under the Eighth Amendment. *Id.* Just as in *Bullock*, even if this Court were to find there is no freestanding innocence claim under the U.S. Constitution, this Court should nevertheless recognize a claim under the Michigan Constitution. Indeed, the so-called "freestanding" actual innocence claim is based in part in the "cruel and unusual punishment" clause of the federal Constitution. *Herrera*, 506 US at 398. Michigan's constitution includes more expansive wording in its corresponding section ("cruel **or** unusual," emphasis added), and thus a more expansive reading of the state constitution's clause makes perfect sense. Because Ms. Swain is factually innocent, see

[18] California: *In re Clark*, 855 P2d 729, 760 (Cal 1993); Connecticut: *Miller v Comm'r of Correction*, 700 A 2d 1108, 1130-31 (Conn 1997); Illinois: *People v Washington*, 665 NE2d 1330, 1336-37 (Ill 1996); Missouri: *State ex rel Amrine v Roper*, 102 SW3d 541, 546 n. 3 (Mo 2003); New Mexico: *Montoya v Ulibarri*, 163 P3d 476, 483-84 (NM 2007); New York: *People v Cole*, 1 Misc 3d 531, 541 (NY 2003); Texas: *State ex rel Holmes v Honorable Court of Appeals for Third Dist.*, 885 SW2d 389, 397 (Tex Crim App 1994).

discussion *infra* Part IV.E, she should be granted relief under the Michigan Constitution.

D. MCL 770.1

This Court should recognize the trial court's broad authority to grant Ms. Swain a new trial pursuant to MCL 770.1 on the basis of her strong showing of actual innocence. Through the enactment of this statute, the legislature made clear its policy decision that, when justice is not done, a trial court should take action to achieve it. The statute states:

> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, **or when it appears to the court that justice has not been done**, and on the terms or conditions as the court directs.

(Emphasis added).

MCL 770.1 expressly authorizes a trial court to grant a new trial when it determines that justice has not been done, and nowhere does it limit that authority to cases appealable as of right. MCL 770.1 is a substantive code of criminal procedure that pertains to the prosecution and punishment of criminal defendants. While MCR 6.431 and MCR 6.500 *et seq.* provide the *procedural* framework for new trials and post-appeal relief, respectively, they do not supersede MCL 770.1, a substantive statute passed by the state legislature.[19] The right of courts to act under MCL 770.1 *in addition to* the court rules is well recognized.[20]

The Court of Appeals's holding that Ms. Swain's claim is time-barred, Court of Appeals Opinion at 7; App. A, is therefore incorrect. MCL 770.2(1) provides that: "[I]n cases appealable

[19] The Court of Appeals reached the opposite conclusion in *Terlisner*, relying on the premise that MCL 770.1 was superseded by MCR 6.431, which governs motions for a new trial. *People v Terlisner*, unpublished opinion per curiam of the Court of Appeals, issued Aug. 26, 2014 (Docket No. 315670), p. 2; App. J . This premise, however, is explicitly foreclosed by this Court's precedent. See *McDougall v Schanz*, 461 Mich 15, 26-27; 597 NW2d 148 (1999) (The Michigan Supreme Court is "not authorized to enact court rules that establish, abrogate, or modify the substantive law"); see also *Terlisner*, unpub op p.4 (Shapiro, J., concurring); App. J.

[20] See, e.g., *People v Lemmon*, 456 Mich 625, 634-35; 576 NW2d 129 (1998) (citing both MCL 770.1 and MCR 6.431 in granting motion for a new trial).

as of right to the court of appeals, a motion for a new trial shall be made within 60 days after entry of the judgment . . . .” (Emphasis added). Because Ms. Swain’s case is not appealable as of right, her MCL 770.1 claim is not time-barred.[21]

This Court should make clear, as it has consistently in the past, that trial courts have broad authority to grant new trials under MCL 770.1 in cases where they determine that “justice has not been done” in the original conviction at issue. For example, in *People v Johnson*, 391 Mich 834; 218 NW2d 378 (1974), this Court held that the trial court was within its discretion to grant a new trial under MCL 770.1 where the judge concluded, had he tried the case without a jury, he could not have found guilt beyond a reasonable doubt. Similarly, in *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979), this Court found that the trial court was within its discretion in granting a new trial under MCL 770.1 where the judge “determined upon the evidence that a reasonable mind might have a reasonable doubt.” *Id.* at 372. Ms. Swain is innocent, and “justice has not been done” in this case if her conviction is allowed to stand. Ms. Swain’s case is precisely the sort of case that the Legislature had in mind when it enacted MCL 770.1, and this Court should make clear that trial courts should not hesitate to act under its authority under these circumstances.

E. This Case Presents the Perfect Opportunity for this Court to Establish an Avenue for Relief Based on Actual Innocence Because the Record Demonstrates that Ms. Swain Meets Even the Most Demanding Standard of Actual Innocence.

While the Court of Appeals held that Ms. Swain failed to make the requisite showing with the record of the case as it stood in 2010, the record has changed significantly since then. As Judge Sindt concluded, and Judge Stephens agreed, the weight of the evidence in this case, as it

[21] Should this Court find that the MCL 770.2(1) 60-day limit does apply, Ms. Swain’s claim can still be granted because she can show good cause for the delay. See MCL 770.2(4). As discussed above and contrary to the finding of the Court of Appeals, Ms. Swain did not learn of the relevant evidence—the phone interview of Dennis Book by Detective Picketts—until 2011.

stands today, makes it clear that no reasonable jury would find Ms. Swain guilty. Not only has the complainant, Ronnie Swain, recanted his testimony over and over again through the years—including in sworn testimony before the trial court in the evidentiary hearing on this motion—but there is also a large amount of evidence that corroborates his recantation and makes clear that the sexual abuse simply did not occur. Ronnie's recantation has been corroborated by the new evidence from Dennis Book, the new recantation from Cody Swain, the new testimony of Mary Stephens and the new affidavit of Cheryl Fox (admitted by stipulation in lieu of her testimony at the 2011-12 evidentiary hearing). The testimony of Book and Ronnie Swain is, in accordance with *People v. Barbara*, further strengthened by the conclusion of an experienced polygrapher that their exculpatory accounts are truthful. 400 Mich 352, 412-13; 255 NW2d 171 (1977). See EH 04/26/2012 at 49, 51. In addition to all of this new evidence of innocence, there is also the old evidence of innocence, including Risk and Winterburn's testimony, and the exculpatory evidence of several witnesses from the original trial. The weight of the evidence now stands greatly and unmistakably in favor of Ms. Swain's innocence.

The Court of Appeals made several significant errors in finding that Ms. Swain was unable to demonstrate actual innocence. First, it relied heavily upon the prosecution's gross misstatement of the record regarding the statements Ms. Swain during an interview with Detective Picketts. Court of Appeals Opinion at 8; App. A. See *supra* Statement of Facts (describing this error). Second, the Court of Appeals placed great weight on the specifics of Ronnie's original trial testimony and that of the prosecution's expert on sexual abuse of children, while quickly dismissing the importance his and his brother's recantations and describing them as "suspect and untrustworthy." *Id.* at 8–9. **The trial court already made a determination that the recantations were credible, and it was not proper for the Court of Appeals to simply substitute its own opinion for the trial court's reasonable finding, which came from**

actually viewing the live testimony.

The Court of Appeals erred in failing to consider the repeated, consistent, and emphatic nature of the recantations and the fact that, upon retrial, both brothers (now adults) would testify that all of the allegations against Ms. Swain were false. Finally, the Court of Appeals clearly erred in evaluating the significance of Dennis Book's testimony, emphasizing that because Book admitted that he was not in the house at all times at which the abuse was alleged to have occurred, his testimony "is not proof that abuse did not occur." Court of Appeals Opinion at 9; App. A. What it failed to recognize is that Book's testimony directly contradicts Ronnie's original allegations that the abuse occurred *every single weekday*. Testimony that proves no abuse could have occurred on a very significant number of those days destroys Ronnie's original (and now recanted) story, and the prosecution's entire theory of the case as presented at trial, as Judge Sindt noted.

The Court of Appeals's characterization of the evidence in its discussion of Ms. Swain's alleged failure to demonstrate actual innocence is fraught with error, and its conclusion is flawed. Ms. Swain's case now has no professed complainant, several distinct lines of testimony undermining the initial allegations and no remaining evidence of guilt whatsoever, except for a thoroughly discredited jailhouse informant. That testimony alone can certainly not be regarded as enough to convict Ms. Swain beyond a reasonable doubt upon retrial — especially given that upon retrial, Ronnie Swain, who is now an adult, would emphatically testify, as he recently did at the evidentiary hearing, that he made up all of the allegations and that no abuse ever occurred. Evaluating the entire record as it stands today leads not only to the determination that no reasonable jury would convict Ms. Swain upon retrial, but also to the conclusion that she is actually innocent. The trial court certainly did not abuse its discretion in granting her a new trial.

V. To the Extent Ms. Swain's Claims are Procedurally Barred, this Court Should Grant Relief Under MCR 7.316(A)(7).

MCR 7.316(A)(7) gives the Supreme Court the power to "enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require." To the extent Ms. Swain's claims presented are procedurally barred by the rules set out in MCR 6.500 *et seq*., relief is requested under MCR 7.316(A)(7). This Court should therefore grant leave to consider exercising its authority pursuant to MCR 7.316(A)(7). See *People v Garrett*, 493 Mich at 949–50 (McCormack, J., concurring) (encouraging the parties to address the scope of relief available under MCR 7.316(A)(7) in light of MCR 6.508(D)).

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Ms. Swain respectfully requests that this Court:

1. Grant this application for leave to appeal to address the important questions presented here, or
2. Summarily reverse the Court of Appeals decision and remand this case to the trial court for a new trial.

Respectfully Submitted,

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